Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

LE BON BRUCE WALKER,
Petitioner,

v.

NEIL SELDMAN
ELIZABETH MENIST, ESQUIRE
DIANE STEWART,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do controversies over real property in the District of Columbia constitute controversies over takings strictly regulated by the provisions under the Fifth Amendment to the United States Constitution?

2. In controversies over real property, should it be required that the District of Columbia Courts originating under Article III Section 2 of the United States Constitution enforce the due process provisions under the Fifth Amendment to also include the absolute right to counsel?

3. In territories of the United States that are not States, is the Fifth Amendment to the United States Constitution which does not include the Equal Protection of the Laws Clause inherent under the Fourteenth Amendment a valid exercise of Congress' power to enforce the due process rights of the residents in civil issues?

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PARTIES TO THE PROCEEDING

The names of the parties to this proceeding are Le Bon Bruce Walker, Petitioner (hereinafter called "Walker"). Petitioner also owned improved real property located at 1922 3rd Street, NW, Washington DC ("the property"). Neil Seldman (hereinafter called "Seldman") who held a deed of trust secured by the property and who directed the Substitute Trustees to foreclose on Walker's property. Substitute Trustees Elizbeth Menist, Esquire (hereinafter called "Menist") and Diane Stewart (hereinafter called Stewart), who foreclosed on the property and issued a Substitute Trustees Deed to Seldman.

JURISDICTIONAL STATEMENT

Petitioner, Walker, noted an appeal on April 24, 2006 of to the DC Court of Appeals from the Order of the DC Superior entered on April 13, 2006 dismissing Walker's case with prejudice, entering judgment for attorney's fees and costs and releasing the Notice of *lis pendens* filed in civil action case No 03-CA-3882. On August 10, 2006, the DC Court of Appeals entered an Order summarily affirming the trial court's Order of April 13, 2006.

Walker filed a Petition for Rehearing or Rehearing En Banc seeking reconsideration of the Order of the DC Court of Appeals granting summary affirmance by the Division and/or by the full Court. On November 3, 2006, the Appellate Court denied the Petition for Rehearing or Rehearing En Banc. The DC Court of Appeals also entered an Order, on November 10, 2006, staying the issuance of its mandate pending the filing of a petition for a writ of certiorari to this Court.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C.. §1254(l).

Jurisdiction is also invoked upon this Court under Article III, Section 2, Clause 2 of the United States Constitution which states in pertinent part:

> "In all other cases before mentioned, the Supreme Court *shall have appellate Jurisdiction* both as to the Law and Fact . . ."

The Fifth Amendment to the U.S. Constitution which states in relevant part:

> "No person shall ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

This case grew out of a foreclosure sale on Walker's real property by Seldman and his Substitute Trustees, Menist and Stewart. The property was Walker's residential property. In November 1999, Walker and his former wife (who joined for the sole and limited purpose of waiver of dower) purchased the property and on January 27, 2000, Seldman loaned Walker the principal sum of One Hundred Seventy Four Thousand U.S. dollars ($174,000.00). Walker executed a promissory note spelling out the terms of repayment and interest. Petitioner also executed a deed of trust on the property as security for the note. Walker borrowed the money to *inter alia* invest in a business venture.

On or about June 7, 2000, Seldman and Walker became business partners and formed Seldman-Walker, LLC for the

purposes of owning, operating, renovating, and developing real property in the District of Columbia. Seldman-Walker, LLC later became SELKER, LLC in June of 2001.[1] In May, 2001, Walker was incarcerated at the Jessup Correctional Institution in Jessup MD. Seldman and Walker remained in contact with each other about SELKER's affairs and Walker trusted Seldman to facilitate a means for him to maintain the payments towards the mortgage on Petitioner's residential property, during his incarceration.[2]

Walker defaulted on his residential loan shortly after his

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[1] Originally Walker was the managing member of Seldman-Walker, LLC and the shares in the Company were divided with Walker having 70% and Seldman having 30%. In June 2001, Walker relinquished his managerial duties of SELKER, LLC to Seldman because of his incarceration and agreed to sell Seldman 20% of his shares as a result. Walker and Seldman executed an Amended Operating Agreement naming Seldman as managing member and making the ownership interests in the Company 50% for Walker and 50% for Seldman. Walker avers that Seldman never gave any consideration for his additional shares.

[2] The property wherein Walker resided that was encumbered by the lien in favor of Seldman was also a source of rental income for Petitioner. Walker renovated his property by changing the floor plan to include ten large bedroom suites made up of a single room with a snack preparation bar and some having a combination small refrigerator and stove. When Walker became incarcerated, Seldman collected the rents from the tenants, but failed to credit the rental payments towards the outstanding mortgage.

incarceration and on January 15, 2002 Seldman directed his Substitute Trustees to foreclose on the property. The following facts are important with respect to the foreclosure sale. On or about November 28, 2001, Seldman sent Walker a letter requesting that Petitioner "cure his alleged default by tendering payment of all arrearages in full with interest under the note as of the date of payment along with a sum sufficient to pay accrued costs and attorneys fees". The letter further instructed Walker to contact Seldman before tendering any money to cure the default for the correct pay off figure. On or about December 15, 26, and 29, 2001, Walker mailed three letters to Seldman informing Seldman of his (Walker's) right to cure or reinstate his residential mortgage (DC Code § 42-815.01) and requesting that Respondent tell him the amount needed to cure the default. Seldman did not respond to any of these requests by Petitioner. On January 20, 2002, Walker received a letter from Seldman's attorney dated December 27, 2001, informing Petitioner that he had to pay the entire amount of the note plus interest, attorney fees and costs. Seldman foreclosed on Walker's residential property without giving him the right to cure his residential default by paying the back mortgage payments, pursuant to DC Code §42-815.01.[3]

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[3] Walker notes here that Seldman not only foreclosed on his residential property without the right to reinstate his residential loan, he also liquidated during the same period all of the real estate belonging to SELKER, LLC, without any written resolution from Walker as required. Under DC Code

On May 12, 2003, Petitioner filed a Verified Complaint in the DC Superior Court against Seldman, Menist and Stewart and the original Trustees alleging wrongful foreclosure, conspiracy to commit fraud, collusion and unjust enrichment, breach of contract and damages. The action assigned DC Super Ct. Case No. 03-CA-3882 alleged *inter alia* that Seldman along with Walker's former employee Carol McIntyre misappropriated the rents from the property and that Seldman, Menist and Stewart illegally foreclosed on the property without giving Walker the right to cure his default on his residential mortgage loan. The Verified Complaint also alleged that Seldman failed to compensate Walker for the additional shares of SELKER and that Seldman mismanaged SELKER's funds and real property and failed to give Walker any accounting, pursuant to his duties as manager.[4]

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§29, et. seq., this is a requirement for dissolution of assets belonging to entities and corporations in the District of Columbia. Litigation involving SELKER, LLC is currently pending in the DC Superior Court (No. 04-CA-4631) and in the U.S. District Court for the District of Columbia. (06-CV-0603 (G.K.)).

[4] Menist and Stewart as mentioned earlier, issued a Substitute Trustee's Deed to Seldman following the foreclosure. Seldman took over the property and moved SELKER, LLC's Offices into the residence. Seldman then obtained a loan for $350,000.00 and executed a deed of trust secured by the property. It is unclear whether Seldman placed Walker's residential property into SELKER, LLC; however, Walker on information and belief contends that Seldman

Walker prayed for the following relief: (1) that the trial court strike the foreclosure notice as invalid and vacate the transfer of title to the property; (2) prevent and/or set aside any sale of the property or transfer of title pending the litigation; (3) void the Substitute Trustee's Deed as fraudulently conveyed; (4) grant compensatory and actual damages in the amount of 50% of the value of the assets of SELKER, LLC; (5) grant compensatory and actual damages in the amount of One Million Dollars ($1,000,000.00); (6) grant punitive damages in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000) for undue emotional and physical stress caused Walker by Seldman's woeful and fraudulent actions and (7) any such other and further relief that the Court may deem just and proper.

The case proceeded in a reasonably normal fashion of pre-trial pleadings including propounding Discovery Requests and Answers, and filing of Motions for Summary Judgment by Respondents wherein the trial court initially granted Seldman's Motion for Summary Judgment on grounds of Walker's alleged failure to Answer one Interrogatory sufficiently. Respondents claimed that Walker's response was an incomplete Answer. Walker sought reconsideration of the Order granting summary judgment and the Court vacated its Order and reinstated

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utilized the proceeds from the refinancing for his personal use and to cover certain debts/expenditures of the Company. The property's fair market value was around 1,000,000.00 in 2002 and is probably now worth in excess of $2,000,000 in keeping with the current real estate market in the District of Columbia.

Petitioner's case on *inter alia* the grounds that a genuine dispute of material fact existed over whether Walker should have been given the statutory right under §42-815.01 to cure his default prior to the foreclosure sale.

The case preceded to a pre-trial conference where the trial court issued an Order on November 18, 2001 calling for the submission of pre-trial memoranda on the following questions: 1. The duty of a substitute trustee on a deed of trust to investigate before foreclosure; 2. What is a "residential property" for purposes of the right of redemption after mortgage default including whether Plaintiff's residence can be defeated by his involuntary absence due to incarceration; 3. What are the elements of civil conspiracy; 4. The parties' election of remedies, and 5; If foreclosure is set aside, can Plaintiff also recover for damages for loss of use of property during the intervening period, and is Defendant Seldman entitled to an equitable set off for any improvements he made to the property.

The trial court ordered, pursuant to the Pre-Trial Order, that all briefs or memoranda on the issues outlined above were to be filed in the DC Superior Court on or before April 1, 2005. The lower court later extended that date to April 11, 2005, in light of the circumstances outlined below. Walker was represented by counsel at all times during these proceedings up until April 16, 2005. At the Pre-Trial conference, the trial court set a trial date for April 25, 2005.

The circumstances surrounding the case just prior to the trial date and at trial took on a convoluted and bizarre turn. On March 17, 2005, Walker's counsel was suspended from the

practice of law in the District of Columbia. See *In Re Edwards*, 870 A.2d 90 (DC 2005).[5] Ms. Edwards had represented Walker from the onset, including filing his action, filing a Memorandum of Law, pursuant to the Pre-Trial Order on April 11, 2005 and answering and propounding Discovery. Walker also notes here that he prosecuted his case with due diligence and never sought a continuance of any hearings, status conferences, pre-trial conferences and he filed all Memoranda required by the Court in a timely manner.[6] Prior to the trial set for April 25, 2005, Walker's counsel sought a stay of the effective date of her suspension on the grounds that she had numerous clients (over 300) and numerous litigated cases and it would be impossible to find substitute counsel for all of her clients in litigated matters

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Under the DC Disciplinary Rules (XI§14), the effective date of counsel's suspension from the practice of law was April 16, 2005 (30 days from the date of entry of the Order by the DC Court of Appeals). During this period, the Appellate Court permits suspended attorneys to complete existing case work, to notify clients of the suspension and to obtain substitute counsel where possible for clients in litigated matters.

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Seldman, et. al. filed a Motion to Dismiss on April 22, 2005, the Friday before the trial date using Walker's counsel's suspension as grounds. Respondents did not serve a copy of the Motion upon Walker (since his counsel was suspended). The court on April 25, 2005, granted Respondent's Motion to Dismiss without allowing the time for Walker to receive the Motion and at least respond within the time required by the DC Super Ct. R.12-I.

prior to their respective trial dates and that it would be impossible to notify all of her clients and wrap up her work for them in 30 days. Counsel listed Walker's case as one of the cases wherein she needed to continue her representation of Petitioner and the DC Bar counsel consented to allow Ms. Edwards the extension of the effective date of the suspension to represent Walker before the DC Superior Court. The Motion to Stay was filed by Walker's counsel in the DC Court of Appeals on March 28, 2005.

Walker was notified by his counsel of her suspension from the practice of law in early April of 2005 and he was also notified by Ms. Edwards that she had obtained substitute counsel to represent him, notwithstanding the pending Motion to stay the effective date of the suspension. Approximately two weeks before the trial was to take place, substitute counsel notified Walker's counsel that she would be unable to represent Petitioner at the trial due to unforseen circumstances. Counsel apprised Seldman, et. al.'s counsels of the situation and she apprised the trial court (through its Clerk) of the difficult position that she was in on behalf of her client, Petitioner.

Walker's by then former counsel (the Motion for Stay of the effective date of counsel's suspension was still pending) had obtained a second substitute counsel to represent Petitioner's case at trial. Shortly before the trial date on Friday, April 22, 2005; however, former counsel advised the court through its Clerk, that substitute counsel had a scheduling conflict in a previous matter and that Walker would probably move for a continuance under these circumstances. The Clerk of the Court

indicated to former counsel that the trial judge ordered her to also attend.

Walker and his former counsel attended the trial on April 25, 2005 and former counsel formally withdrew from the case in compliance with DC Bar Rule XI § 14. She also advised the trial court that she had obtained substitute counsel and he had accepted the case, but he had a scheduling conflict; he was in another court in a previous matter at the same time and could not attend. Former counsel indicated to the Court that substitute counsel asked her to seek a continuance on his behalf in light of the scheduling conflict and in light of the fact that he was just entering a case that had progressed substantially to the trial stage and he needed time to familiarize himself with case. Former counsel also advised the Court of her pending Motion to Stay the effective date of her suspension.

Petitioner also requested a continuance given his circumstance that he was suddenly without any counsel, through no fault of his own, the counsel who had successfully represented his interests since the initiation of his action in the DC Superior Court. Despite Walker's only request for a continuance throughout the duration of his case, the trial court denied his request and dismissed his case orally for want of prosecution and granted Seldman et. al.'s Motion to Dismiss. Petitioner suffered the severe sanction of dismissal of his case simply because he indicated that he needed counsel to handle the complex issues imposed by the trial court (the questions that the parties were required to answer in the pre-trial memoranda), and that he lacked the legal acuity to proceed as a pro se litigant in

his case, and that he was literally too intimidated to proceed without counsel. This was true particularly given his perception of the acrimonious nature of the Respondents and of the trial Judge throughout the proceedings.

On May 5, 2005, Walker's former counsel received a limited stay of the effective date of her suspension, in particular to represent Walker at trial. She immediately opposed the Motion to Dismiss and sought reconsideration of the trial court's oral Order in light of the stay. Walker on the day before his counsel received the stay, also filed a Motion for Reconsideration of the April 25, 2005 oral Order from the bench. The trial court denied the Motion for Reconsideration, despite the changed circumstances regarding Walker's counsel (she could now represent his interests at trial). Walker's Motion for Reconsideration was filed under SCR Civ 59(e).

Walker noted an appeal from the written Order denying Petitioner's Motion for Reconsideration and entered on July 26, 2005, to the DC Court of Appeals (No. 05-CV-1049) before the DC Court of Appeals granted Respondent's Motion for Summary Affirmance and entered an unpublished Memorandum Opinion and Judgment to this effect on December 21, 2005. The DC Court of Appeals subsequently denied Walker's Petition for Rehearing or Rehearing En Banc on February 14, 2006 and denied his Motion to Recall its Mandate on February 23, 2006.

During the pending appeal (No. 05-1049) before the DC Court of Appeals, Seldman filed a Motion to cancel the Notice of *Lis Pendens* against the property and he filed a Motion for Attorney's Fees and costs. The trial court delayed its ruling on

the Motion pending the disposition of the appeal until after the Order was summarily affirmed. Seldman subsequently petitioned the trial court to award him attorneys fees for his defense against Walker's appeal. On April 13, 2006, the trial court entered a final Order, granting Seldman's Motion for Cancellation and Release of Notice of *Lis Pendens* and for Attorney's Fees, as well as, his Supplemental Motion for additional attorneys fees and costs for defending against Walker's appeal. The trial court also amended its Order of April 25, 2006 and dismissed Walker's Verified Complaint with prejudice for want of prosecution under SCR. Civ. Rule 41(b).[7]

Walker noted an appeal from the trial courts' Order of April 13, 2006 (DCCA No. 06-CV-000479). Petitioner notes that the total award for attorneys fees and costs, including the costs to seek the removal of the notice of *Lis Pendens* was in excess of $95,000.00. Pursuant to Seldman's Motion for Summary Affirmance filed in appeal No. 06-CV-00479, the DC Court of Appeals entered on August 10, 2006, an unpublished Memorandum Opinion and Judgment summarily affirming the trial court's order of 4/13/06 and citing as applicable legal authority *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (DC 1988) and

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[7] Walker filed Responses to Seldman's Motion to vacate the notice of *Lis Pendens* and to be awarded attorneys fees incurred for Seldman's defenses in the trial court and the DC Court of Appeals. In the Responses, Walker asked for a hearing on the merits and the trial court denied this request.

D.C. Code §42-1207. On September 11, 2006, Walker filed a Petition for Rehearing or Rehearing *En Banc* in the Appellate Court and on November 3, 2006, the DC Court of Appeals denied the Petition in entirety. The DC Court of Appeals; however, stayed its mandate pending the filing of the instant Petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING THE PETITION

I. Controversies over Real Property in the District of Columbia Constitute Controversies over Takings Strictly Regulated by the Due Process Provisions under the Fifth Amendment to the United States Constitution.

The founding fathers of the United States Constitution, ratified in 1789 intended that the seat of the Federal Government, which was derived by the transfer of certain sovereign powers of the States to it, should be at a neutral site and not within any existing State. As a result, the District of Columbia was created to serve as the seat of the Federal Government. The result is that the residents of the District of Columbia do not have full representation in Congress and Congress possesses over the District of Columbia the blended powers of a local and national legislature. *Shoemaker v. United States*, 147 U.S. 282, (1993); *O'Donoghue v. United States*, 289 U.S. 516 (1933).

The inhabitants of the District of Columbia, therefore, derive due process protections from the Fifth Amendment to the United States Constitution because the District is not a State *Bolling v. Sharpe*; 347 U.S. 497 (1954). The U.S. Supreme Court has written much case law in an effort to amend the U.S.

Constitution to equate the due process clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution, which strictly speaking applies only to the States. See for example, *Hepburn v. Ellzey,* 2 cr. (6U.S.)445 (1805); *Bolling v. Sharpe,* supra; *National Mutual Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949) (DC Courts have diversity jurisdiction under Article III); *Wright v. Davidson*, 181 U.S. 371, 384 (1901); *Callan v. Wilson*, 127 U.S. 540 (1888) (All persons within the territory of the United States including the inhabitants of the District of Columbia are entitled to due process of laws); *Lovato v. New Mexico,* 242 U.S. 199, 201 (1916). There is; however, no equal protection of the laws clause in the Fifth Amendment to the U.S. Constitution.

The framers of the United States Constitution drafted a Bill of Rights to quell the fears of the citizens of the newly formed United States who were concerned that the Central Federal Government might by arbitrary decisions infringe upon their newly won freedoms. The Bill of Rights was adopted and ratified by the States in 1791 and its principles derived from the concepts written in documents such as the Magna Carta, the Declaration of Independence, and the Virginia Declaration of Rights. Inherent in these documents was the concept that the basis of government derives from its people and that the government may not infringe upon the privileges or freedoms of its citizens. It is also incorporated into the Bill of Rights from its predecessor the Magna Carta of 1215 A.D., the concept that citizens of the United States are entitled to protect their property rights (including real property) from encroachment by the government or by private citizens.

It became apparent to the legislatures and constitutional experts that the Federal Courts may have lacked the authority to enforce the provisions of the Bill of Rights against state laws and court decisions, since the states exclusively retained powers not transferred to the Federal Government. To resolve this problem, the Fourteenth Amendment was adopted and ratified in 1868 following the Civil War and Reconstruction and it was added to the Bill of Rights. The Fourteenth Amendment to the United States Constitution expressly guarantees the rights of citizens within the boundary of a state to due process of law regarding *inter alia* property and the guarantee that citizens within a state will have the equal protection of the laws, as well as the guarantee that Congress must enforce the provisions of the Fourteenth Amendment.

It is reasonable to argue that the words of the United States Constitution, strictly construed and used in their ordinary plain meaning provides with respect to *inter alia* property rights that citizens or residents of a state are entitled to the due process protections and are entitled to the equal protection of the laws which the courts must enforce. *Marbury v. Madison,* 5 U.S. 137, 174 (1803); *South Carolina v. United States*, 199 U.S. 437, 438 (1905); *Gibbons v. Ogden*, 22 U.S. 1 (1824). Therefore, Petitioner argues that residents of a state based upon the actual words of the Constitution are guaranteed through the Fourteenth Amendment's due process and equal protection clauses, protections from unfair governmental influence or taking of property even by corporations or private entities. (Substantive and procedural due process) without due process of law. It can

be reasoned here that in matters involving real property, the fundamental right to substantial justice in the courts is protected as to residents of states by the U.S. Constitution. This includes takings of property by the government or by private citizens, or entities (i.e. corporations, LLC's). Petitioner contends that controversies involving real property, which include controversies between citizens and takings for public use are all subject to the Equal Protection of the Laws Clause of the Fourteenth Amendment to the US Constitution.

Walker argues that the same situation does not exist for the residents of the District of Columbia, despite the Supreme Court's Legal Treaties interpreting the U.S. Constitution's due process clause of the Fifth Amendment to the United States to be essentially the same as that in the Fourteenth. *Bolling v. Sharpe,* supra; *United States v. Bitty,* 208 U.S. 393, 399-400 (1908). In fact, it is safe to argue here that the purpose underlying the creation of District of Columbia (to be a federal jurisdiction to seat the federal government directly controlled by Congress) automatically diminishes the full effect of an Amendment designed to protect states rights. The District is not a state, it is the seat of the Federal Government and Petitioner argues that real property belonging to the District's residents are in truth subject to more federal control than property owned by residents of states. Strictly construed, only the provisions of the Fifth Amendment apply to the District of Columbia. *Gibbons v. Ogden,* supra (words of the U.S. Constitution strictly construed); *Woodson v. Murdock,* 89 U.S. 351, 369 (1874); *State of Rhode Island v. The State of Massachusetts,* 37 U.S. 657 (1938); *Adams*

v. Clinton, 90 F. Supp. 2d 27 (D.DC. 2000).

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Walker argues that the unique situation of the territory of the District of Columbia (it is actually on federal land) and/or created for a federal purpose subjects all controversies regarding real property even those controversies involving private citizens to the Takings Clause of the Fifth Amendment. In other words, in the District of Columbia any controversy over real property is a controversy over a taking because the land in question is situated on lands expressly carved out from Virginia and Maryland to seat the Federal Government.

Walker argues that the even the unique situation in the District of Columbia regarding real estate values adds support to this contention. In the District within the last 5 years, real property values have escalated to the point where real estate such as in the instant controversy is easily valued in excess of $1,000,000.00. This fact coupled with the fact that real

property in the District is located on federal land subjects any controversy over real estate to the Takings Clause under the Fifth Amendment and calls upon the courts to enforce the heightened due process provisions under the Fifth Amendment to property protections which include advising a litigant to the right to counsel before proceeding. In essence, Walker argues that for purposes of the Fifth Amendment's Takings Clause, there should be no difference in controversies between private citizens, corporations, LLC's or other entities, or government organizations. All parties must be or should be represented by counsel in controversies involving real property in the District, unless an individual expressly seeks to waive that right. Petitioner submits that the same level of due process protections afforded to persons in criminal cases to the right to counsel ought to be afforded to persons in civil cases regarding real property rights, where such persons derived their rights from the Fifth Amendment to the U.S. Constitution.

The U.S. Supreme Court recently held in *Kelo v. City of New London,* 268 Conn 1, 843 A.2d 500 (affirmance) S.C. No 04-108 (2005) that state and local governments could seize privately owned land on behalf of private developers. In a dissenting opinion, Justice Sandra Day O'Connor argued that any property may now be taken for the benefit of another private party . . . but the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. Justice O'Connor argued that the decision in *Kelo* (5-4) eliminates "any distinction between private and public use of

property and thereby deletes the words "for public use" from the Takings Clause of the Fifth Amendment. This case although it involves state government, is not inapposite Walker's argument that any controversy over real property in the District of Columbia is consistent with a controversy over a taking. The problem in the District is; however, that there is no equal protection of the laws clause under the Fifth Amendment which promotes even greater concern about real property controversies and the need for the DC Courts to make representation by counsel in such instances mandatory.

Currently, in such important matters as controversies over valuable real property, the DC Courts do not have to require, enforce or acquiesce to the right of a private citizen to legal counsel under the due process clause of the Fifth Amendment. Such a situation for the residents in a territory that is basically federal land and subject to the provisions of Fifth Amendment to the U.S. Constitution violates the very intent that the framing fathers had when they formed the Bill of Rights to protect *inter alia* U.S. citizen's property rights.

In the instant case, the trial court dismissed Walker's case involving the unlawful foreclosure on his real property for his alleged failure to prosecute under SCR Civ 41 (b). The actual facts dictate otherwise. In reality, the trial court attempted to coerce Walker into representing himself at trial telling him that the court had narrowed the case to one issue and that in its opinion, he could proceed in his proper person. The trial court ignored the fact that Walker and his former counsel stood before it and requested a continuance in light of his counsel's

sudden suspension from the practice of law (the only continuance ever requested by Petitioner). There was no sound reason for the lower court to take this drastic approach simply because the Respondents would have to come to court on another day. In short, the trial court and the DC Court of Appeals in summarily affirming the decision provided absolutely no constitutional safeguards for Walker and the DC Courts allowed what amounts an unlawful taking of Walker's real property by a larger interest[8] without due process of law.

It was ludicrous for a court to subject a litigant whose rights to a fair trial derived from the Fifth Amendment to the United States Constitution, to representing himself instead of granting a continuance so that he could have counsel prosecute his unlawful foreclosure action. Fundamental fairness and justice inherent in the procedural and substantive components of the Due Process Clause of the Fifth Amendment with respect to real property takings or otherwise in the District of Columbia dictate a different result.

II. Controversies over Real Property Should Require the Courts in the District of Columbia to Enforce an Absolute Right to Counsel under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

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[8] Seldman was not only the managing member of SELKER, LLC, he is the founder of the Institute for Local Self Reliance ("ILSR") which is a state wide organization. Seldman routinely used funds from SELKER to fund projects in the ILSR including as mentioned earlier, funds from re-financing Walker's real property after the foreclosure.

The arguments outlined in Section I of this Petition for a Writ of Certiorari are referenced and incorporated herein. Walker has argued that controversies over real property in the District of Columbia automatically involve a controversy over takings under the Fifth Amendment to the U.S. Constitution and that such controversies should require heightened due process protections by the Courts including the absolute right to be represented by counsel. Petitioner reiterates that because the District of Columbia is not a state, it is subjected to the due process clause of the Fifth Amendment and strictly construed the Fifth Amendment contains no equal protection of the laws clause, so the Courts should be required to guarantee the absolute right to representation by counsel in civil matters involving real property. Courts created under Article III of the U.S. Constitution in territories that are not states should not attempt to force litigants in such instances to represent themselves, in proper person.

The Fifth Amendment is a restraint on the legislative and on the executive and judicial powers of the government. All persons, especially inhabitants of the District of Columbia within the territory of the United States are entitled to its protection, including incorporations, aliens and citizens seeking readmission to the United States. *Wright v. Davidson* supra; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). Due process of law or the "law of the land" under the Fifth Amendment must not only entitle or enforce precise safeguards of accused persons to

counsel, it must also entitle the same safeguards to persons in controversies over property. (i.e. just compensation upon taking of private property for public use or the taking of private property by private entities). *Kelo v. City of New London,* supra.

It flows from this reasoning that due process of law under the Fifth Amendment with its broad inclusions against actions of the federal government regarding individual persons accused of crimes, against self incrimination in a criminal and/or civil proceeding, against custodial interrogation and against takings of property must include the compulsory clause to the right to have the assistance of counsel similar to that right under the Sixth Amendment to the United States Constitution. Petitioner argues that framers of the Constitution and the Bill of Rights did not intend for the courts of the land to deny to its citizens the right to counsel simply because they were proceeding in a civil matter. The language of the Fifth Amendment certainly did not intend this result. Walker maintains that the clause in the Fifth Amendment which states: nor [shall any person] be deprived of life, liberty, or *property*, without due process of law" guarantees that the Court's enforce the right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Petitioner maintains that in the District of Columbia where property rights are concerned and where Walker contends that any controversy over real property is a controversy over a taking, any court that fails to bend over backwards to make sure that a party bringing an action is represented by counsel and then goes on to rule adversely against that party has rendered an arbitrary and capricious or unreasonable ruling. There is no

doubt that any court that deliberately prevents a party from seeking counsel simply for the convenience of the other parties (as was this situation in the instant case) where his real estate is involved (or for any issue), has rendered an arbitrary and capricious ruling.

Walker maintains that the DC Appellate Court can shelter its unlawful rulings of this type that are actually abuses of the lower court's discretion by applying loosely the Rules of Civil Proceedings. That is, the trial court can state, for example, *this is a last minute request for a continuance to get counsel and I don't care that you encountered extraordinary circumstance. The opposing side is ready to go to trial and you can either represent yourself against this team of lawyers or I will rule that you failed to prosecute. Be aware; however, that if you elect to proceed on this very narrow issue regarding your real property that any pro se litigant ought to able to prosecute, anything you say can and will be used against you.* This is exactly the scenario presented to Petitioner at trial on April 25, 2005.

The trial court succeeded in intimidating Walker so that he would not attempt to litigate the case himself[9] so that it could

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[9] Walker, when faced with this decision, asked if he could speak to his former counsel to get the documents in her possession that could help him present his case. The Court stated that he could not do this because a suspended attorney would be advising him. The Court prevented former counsel from even assisting him to plead his case as a friend, by providing the documents that were in her possession. *United*

enter a ruling of failure to prosecute under DC SCR Civ. R. 41(b). Walker must reiterate here that he had never sought a continuance in any prior trial proceeding. The DC Court of Appeals then in turn entered rulings summarily affirming (in an unpublished opinion that has no legal precedent) the trial court's decisions. Entering an Order granting summary affirmance permits the Court to eliminate important issues or satisfy a special interest non-meritoriously or give undeserving parties a win or a favorable decision that cannot really be sufficiently challenged in a higher appellate court. It permits a court to exact a decision that goes against legal precedent (i.e. no property owner's residence can be taken through foreclosure without a right to reinstate a residential loan) and since it is unpublished, it cannot be adequately challenged on appeal.

The right to own and protect one's real property is a valuable one protected by the U.S. Constitution. The language of the Constitution provides guarantees against a taking of property by government and by private citizens and whether it is taken by the government or lost to special interests, the result is the same, the property is lost to the individual. Property rights whether it be over one's person, real estate (particularly where values exceed $250,000) or over one's valuable personal property must be enforced by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Residents of the District of Columbia do not have the equal protection of the laws clause provided to the residents

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Mine Workers v. Illinois Bar Assoc. 389 U.S. 217(1967)

of a state and they are strictly subject to the provisions of the Fifth Amendment to the U.S. Constitution. This Article not only has no component regarding equal protection of the laws, it has no statement that Congress shall have power to enforce for example the due process clauses (although this probably axiomatic).

Petitioner is arguing here that because of the unique issues in the matters involving real property in the District of Columbia, the Fifth Amendment should be read to mean that every component of the Amendment whether it involves criminal proceedings or real property proceedings should have the same force with respect to the right to counsel. In other words, if a civil litigant is standing before the Court in a controversy over real property or a taking of real property, the heightened safeguards to representation by counsel should be employed just as it is in a criminal matter where the accused enjoys the privileges of the Fifth and Sixth Amendment. ("the accused shall enjoy the right to have assistance of counsel). Alternatively, persons litigating in matters involving real property in the District of Columbia where as Petitioner argues, corporations, entities and individual inhabitants are the same since any controversy is a controversy over a taking, should be prohibited by the courts from undertaking litigation without counsel. This would be a measure of equal protection of the laws enjoyed by the states with respect to real estate.

Walker argues here as he has previously, that the DC Courts enjoyed too much leeway in his civil matter and the result was disastrous. He lost a property valued over

$2,000,000.00; he lost all of his business assets and $95,000.00 in legal fees and costs derived from litigation in the lower court and the DC Court of Appeals were added to his debt. This was compounded by the fact that he lost the real property while he was incarcerated and had no freedom to move about. Petitioner notes here that he would have succeeded on the merits of his case had he been represented by counsel in that Seldman's actions were prohibited by DC Statue. Instead, Petitioner received a non-meritorious adverse decision because of the trial court's chicanery and he was subjected to the DC Court of Appeals' non-meritorious resolution of the matter by summary affirmance.

Walker was denied due process and the equal protection of the laws and he believes that the DC Courts were not obligated enough to enforce a clause (equal protection) that was not expressly written under the Fifth Amendment to the U.S. Constitution. There must be more protection afforded to DC residents regarding their valuable real estate from unscrupulous interests. There should be no court(s) standing as an impartial body that would deny to a resident the right to counsel in matters involving his real property. Certiorari upon the DC Court of Appeals should be granted based upon the issues and arguments raised in Sections I and II under Reasons for Granting this Petition.

III. The Fifth Amendment to the United States Constitution which does not contain the Equal Protection of the Laws Clause, but which Governs the Territories that are not States is not a Valid exercise of Congress' Power to Enforce Due Process Rights of such Residents in Civil Issues.

To give validity to the history of the construction of the U.S. Constitution, it must be stated that with respect to the District of Columbia, the framers when the Constitution was drafted and ratified by the states sought, as presented earlier, to separate the seat of government from the states. Therefore, a separate territory was carved out only for the purposes of housing the central government of the United States so that it could carry out its business of the welfare of the whole nation free from the control of any State.[10]

Thus, there was not given much recorded consideration initially to the inhabitants of the land where the newly formed government was now situated in terms of a Bill of Rights. James Madison in the Federalist, No.43 (J Cooke, ed 1961), 289 stated the following:

> [the inhabitants] "Will have their voice in the election of the government which is to exercise authority over them, as a municipal legislative for all local purposes derived from their own suffrages, will of course be allowed them . . ."

Other scholars and political figures of the times wrote similar

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The formation of the District of Columbia to seat the Federal Government grew out of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, and physically threatened and verbally abused members of Congress and caused them to flee the city when neither municipal nor state authorities would take action to protect the members. W. TINDALL, TITLE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA (Washington, 1903), 31-36.

treatises about the rights of District residents.

The result was that U.S. Constitution strictly construed, provided and still provides today only the protections of the due process clause of the Fifth Amendment to the U.S. Constitution. It is not a state and it was never intended to be a state (*Adams v. Clinton,* supra), nonetheless, its residents are residents and citizens of the United States and Walker argues here that residents of the District of Columbia (and residents of the territories controlled by the United States) are entitled to the same protections of their rights to life, liberty and property that the states enjoy under the concept of States Rights. In other words, although the District of Columbia's inhabitants are under the direct control of the Federal Government they should also be afforded the same inalienable rights and property rights from government encroachment that citizens of states enjoy.

The truth is that even though the Supreme Court has interpreted the Equal Protection of the Laws Clause of the Fourteenth Amendment to also provide equal protection of the laws under the Fifth Amendment, the words of the Amendment do not state it. *Bolling v. Sharpe,* supra. In our system of jurisprudence, the words of a statute or law are accorded its strict, everyday or ordinary common meaning. *Wright v. U.S.,* supra; *South Carolina v. United States*, supra. Therefore, enjoyment of a law is limited to what is written in that law. The inclusion of the equal protection of the laws clause is what gives Congress and the courts the right to enforce the rights of the people against due process violations. Congress cannot enforce the law unless it is stated therein.

Residents in the District of Columbia do not have adequate protections against, for example, takings of their real property by special interests and or by developers. DC is not a state and it was never intended to be a state when the framers of the Constitution claimed the territory because it is the seat of United States Government. This was not the purpose of its creation. Nonetheless, there should be no bar to its residents receiving the full and equal protections of the laws that apply to them (The Fifth Amendment).

Due process, particularly in civil matters to persons whose rights derive from the Fifth Amendment cannot be adequately enforced without the inclusion of an equal protection of the laws clause in the Amendment. The Courts are now free to make arbitrary decisions like the decision made in the instant case and at least a greater measure of protection regarding property rights (and other rights) would be afforded to the District's residents if language regarding equal protection of the laws are included in the Fifth Amendment.

Even though Congress permitted a form of self-government to the District in 1970, this does not overcome the fact that the due process clause under the Fifth Amendment contains no equal protection of the laws clause and the highest Court has maintained that these clauses (Equal Protection and Due Process) are not the same. Petitioner believes that the lack of adequate protection of the rights of DC residents regarding real property helped to aide the escalation on real estate and over speculation and the unlawful taking of property by developers and investors. Walker also maintains that the symbiotic relationship between the private interests and the

DC Government have helped accomplish this effect. These "takings" are not regulated by the DC Government; the Government benefits from the housing situation and the DC Courts are in many instances permitting developers, etc. to take private citizen's property without assuring or affording heightened due process protections for the homeowners.

Petitioner maintains that the unique situation in the District in that its residents are afforded only the protections under the Fifth Amendment (no Equal Protection of the Laws Clause) permits the DC judiciary to play fast and loose with a homeowner's rights resulting in the exact scenario that occurred in the instant case.

CONCLUSION

In light of the arguments presented in this Petition for a Writ of Certiorari, Petitioner prays that this Court grant the Petition.

Respectfully submitted,

Le Bon Bruce Walker, pro se
203 Seaton Place, NE
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(202) 491-2940

DATED: February 1, 2007

APPENDIX OF ORDERS
AND EXHIBITS

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 06-CV-479 **FILED NOVEMBER 16, 2006**

LE BON BRUCE WALKER
Appellant,

v. CAB3882-03

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge, Farrell, Associate Judge, and Terry, Senior Judge

O R D E R

On consideration of appellant's unopposed motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari, and it appearing that the mandate was due to issue on November 10, 2006, it is

ORDERED that the motion is granted and the Clerk is directed to stay issuance of the mandate through February 8, 2007. Appellant is directed to advise this court in writing upon the filing of his petition in the Supreme Court of the United States. D.C. App. R. 41(d)(2)(B).

PER CURIAM

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Clerk, Superior Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 06-CV-479 **FILED NOVEMBER 3, 2006**

LE BON BRUCE WALKER
Appellant,
v. CAB3882-03

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge; Farrell, Ruiz, Reid, Glickman, Kramer and Fisher and Blackburne-Rigsby, and Thompson, Associate Judges; *Terry, Senior Judge

O R D E R

On consideration of appellant's *pro se* petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 06-CV-479 **FILED AUGUST 10, 2006**

LE BON BRUCE WALKER
Appellant,
v. CAB3882-03
NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge Farrell, Associate Judges, and Terry, Senior Judge.

J U D G M E N T

On consideration of appellees' motion for summary judgment and the opposition thereto, it is

ORDERED that the motion for summary affirmance is granted. It is

FURTHER ORDERED AND ADJUDGED that the order on appeal is hereby affirmed. *See Kudon v f.m.e.*, Corp., 547 A2d 976 (D.C. 1988) and D.C. Code § 42-1207 (d) (2001).

ENTERED BY THE DIRECTION OF THE COURT
/s/
GARLAND PINKSTON, JR.
Clerk of the Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1049 **FILED FEBRUARY 14, 2006**

LE BON BRUCE WALKER
Appellant, CAB3882-03

v.

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Washington, Chief Judge *Schwelb , Farrell, Ruiz, **Reid, *Glickman, Kramer and Fisher, Associate Judges, *Nebeker, Senior Judge.

O R D E R

On consideration of appellant's *pro se* motion for reconsideration, of judgment order granting summary affirmance and denying summary reversal, construed as a petition for rehearing or rehearing en banc, it is

ORDERED that appellant's motion for summary reversal is denied. It is

ORDERED by that the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

** Judge Reid has recused herself from this case.

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1049

FILED DECEMBER 21, 2005

LE BON BRUCE WALKER
Appellant, CAB3882-03

v.

NEIL SELDMAN, et.al.
Appellees.

BEFORE: Schwelb and Glickman, Associate Judges, and Nebeker, Senior Judge.

JUDGMENT

On consideration of appellees' motion for summary affirmance, appellant's opposition and cross-motion for summary reversal and appellee's reply, it is

ORDERED that appellant's motion for summary reversal is denied. It is

FURTHER ORDERED that appellees' motion for summary affirmance is granted. *See Jones v. Cain,* 804 A.2d 322, 330 (DC 2002). It is

FURTHER ORDERED AND ADJUDGED that the order on appeal is hereby affirmed.

ENTERED BY THE DIRECTION OF THE COURT
/s/
GARLAND PINKSTON, JR.
Clerk of the Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1049 **FILED APRIL 6, 2006**

LE BON BRUCE WALKER Appellant, CAB3882-03
v.
NEIL SELDMAN, et.al. Appellees.

BEFORE: Schwelb and Glickman, Associate Judges, and Nebeker, Senior Judge.

ORDER

On consideration of the motion of *pro se* appellant to recall mandate, and the opposition thereto, it is

ORDERED that the motion is denied.

PER CURIAM

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LE BON BRUCE WALKER Plaintiff,	:	
	:	Civil Action No. 03-3882
v.	:	Calendar 14
NEIL SELDMAN, et. al., Defendants.	:	

ORDER

This matter is again before the court on Defendant Seldman's motion for cancellation and release of the notice of lis pendens and his motion for a judgment awarding attorneys' fees and costs. On April 25, 2005, the court dismissed Plaintiff's action pursuant to Super. Ct. Civ. R. 41(b). The order was docketed on April 27, 2005. Defendant Seldman timely filed his motions on May 11, 2005. On July 25, 2005 (docketed July 26, 2005), the court denied Plaintiff's motion for reconsideration of the April 25, 2005 order of dismissal. Plaintiff appealed that order, and Defendants noted a cross-appeal. In its July 25, 2005 order, the court deferred ruling on Defendant's instant motions pending the outcome

of any appeals. On December 21, 2005, the Court of Appeals summarily affirmed this court's denial of Plaintiff's motion for reconsideration of the order of dismissal, and on February 14, 2006, the Court of Appeals denied Plaintiff's petition for rehearing and rehearing en banc. On February 15, 2006, the Court of Appeals dismissed Defendants' cross-appeal as moot. On February 24, 2006, Defendant Seldman filed a supplement to his motion to include the additional attorneys' fees and costs incurred defending Plaintiff's appeal. On March 15, 2006, Plaintiff filed in the Court of Appeals a motion to recall the mandate. The Court of Appeals denied that motion in an order entered April 6, 2006. Defendant Seldman's motions are therefore finally ripe for decision.

Defendant's motion for cancellation and release of the notice of lis pendens will be granted. Pursuant to D. C. Code § 42-1207(d), Defendant Seldman now has a final judgment of dismissal and he is entitled to an order canceling and releasing the notice of lis pendens.

Defendant Seldman is also entitled to an award of attorneys' fees and costs. Plaintiff defaulted on his mortgage. Defendant Seldman foreclosed. Plaintiff filed this action seeking to set aside the foreclosure alleging, *inter alia*,

wrongful foreclosure, conspiracy to commit fraud and unjust enrichment. Plaintiff's Deed of Trust provided, in pertinent part:

> In the event that Grantor breaches any of the covenants, undertakings or warranties of this Deed of Trust, or institutes or defends any litigation in an attempt to prevent Holder from enforcing the terms of the Deed of Trust or Note and does not prevail in that litigation, then Holder will be entitled to damages from the Grantor, including the amount of any counsel fees and other litigation expenses incurred in enforcing the Deed of Trust and Note.

Plaintiff, to say the least, "does not prevail in that litigation." He narrowly escaped summary judgment and then elected not to proceed on the day of trial. There has now been entered a final judgment of dismissal, and Plaintiff has exhausted all rights of appeal.[1] The provision for attorneys' fees in the Deed of Trust is clear and unambiguous. The only question for the court is whether the fees requested are "reasonable."

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[1] It is both wrong and disingenuous for Plaintiff to argue that the dismissal of this action was not a judgment on the merits. Pursuant to Super. Ct. Civ. R. 41(b), the dismissal is an adjudication on the merits. Moreover, Plaintiff's election not to proceed to trial on April 25, 2005 deprived Defendants of their opportunity to demonstrate once and for all the Plaintiff's challenge to the foreclosure was without merit.

Concord Enterprises Inc. v. Binder, 710 A.2d 219, 225 (DC 1998). The court has carefully scrutinized Defendant's statement of fees submitted by his counsel. The amount, while large is fully justified by the nature of the litigation. The hours spent by counsel were reasonably necessary to defend the action brought by Plaintiff, and the hourly rates charged by the attorneys were certainly commercially reasonable considering the competence and experience of the attorneys involved.[12]

As the prevailing party, Defendant Seldman is entitled to an award of costs pursuant to Super. Ct. Civ. R 54(d). This covers filing fees and other ordinary court costs. Extraordinary costs are recoverable under Rule 54-I. This certainly includes deposition transcripts, records' search and fees for copying, and other expenses for materials to be used at trial or necessary for the preparation of an adequate defense. Defendant Seldman also seeks costs for Westlaw

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[2] At least some of the attorneys' fees charged were attributable to the rather haphazard way in which Plaintiff chose to litigate his action. Even a cursory review of the motions and orders in the court file demonstrates Plaintiff's numerous defaults in his discovery obligations and failure to prosecute his case with reasonable diligence.

research, long distance calls, travel to court, parking and the like. Whether or not the court would exercise its discretion to award these amounts pursuant to Rule 54-I, they are plainly reasonable under the circumstances of this case and recoverable as a matter of contract under Paragraph 10 of the Deed of Trust.

For the foregoing reasons, it is this 13th day of April, 2006,

ORDERED that judgment shall be entered in favor of Defendants dismissing the complaint with prejudice; and it is further

ORDERED that, pursuant to D. C. Code § 42-1207(d), the judgment shall expressly provide that the notice of lis pendens recorded in the Land Records of the District of Columbia Recorder as instrument no. 58964 on May 14, 2003, is cancelled and released, and it is further

ORDERED that the judgement for Defendant Seldman shall include the award of attorneys' fees in the amount of $91,702.50 and costs in the amount of $3,367.05, plus the cost of canceling and releasing the notice of lis pendens, plus interest on these amounts at the statutory rate from the date of judgment.

/s/

JUDGE FREDERICK H. WEISBERG

Order docketed 4/13/06
and copies mailed from
chambers, First Class Mail
to parties indicated above
on 4/14/06

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

LE BON BRUCE WALKER	:	
Plaintiff,	:	
v.	:	Civil Action No. 03-3882
	:	Calendar 14
NEIL SELDMAN, et. al.,	:	
Defendants.	:	
	:	

ORDER

This matter is before the court in an unusual procedural posture. On April 25, 2005, the court dismissed this action for want of prosecution. Two days later, on April 27, 2005, Plaintiff filed a notice of appeal from that ruling. Thereafter, on May 4, 2005, Plaintiff filed with this court a motion for reconsideration of the April 25th order, in the nature of a motion pursuant to Super. Ct. Civ. R. 59(e). Ordinarily, absent a remand, the filing of Plaintiff's notice of appeal would deprive the trial court of jurisdiction to grant (but not to deny) Plaintiff's motion. Smith v. Pollin, 90 U. S. App. D.C. 178, 179; 194 F.2d 249, 250 (1952). However, on July 19, 2005, the District of Columbia Court of Appeals entered an order dismissing the appeal as premature because of the

pendency of Plaintiff's Rule 59(e) motion in the trial court. Accordingly, Plaintiff's motion is now before the court on the merits. The matter is also before the court on Defendant Neil Seldman's motions to release the *lis pendens* and his motion for attorneys' fees and costs.[1]

Plaintiff has presented nothing in his motion for reconsideration that was not before the court on April 25, 2005. The decision to dismiss this action after denying Plaintiff's untimely request for a continuance was not one the court took lightly. The court made its decision only after hearing at length from Plaintiff and Ms. Edwards, who at that time was under suspension and could appear only as a fact witness, as well as counsel for Defendants. However, in light of certain representations in Plaintiff's pleadings, the court will address some of the points Plaintiff has raised.

First, Plaintiff asserts in footnote one of his reply to Defendants' opposition to his Rule 59 motion and again on page five of the same pleading that the court's law clerk told Ms. Edwards on April 22, 2005, that, given her inability to

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[1]Plaintiff opposed both of Defendant Seldman's motions and also filed on May 11, 2005, a belated written opposition to Defendants' motion to dismiss, which Defendants filed before the trial date of April 25, 2005.

produce a substitute lawyer for the Plaintiff, the court would in all likelihood grant a continuance on the morning of trial, the following Monday. This is emphatically not true. By April 22, 2005, the court had already received Defendants' written motion to dismiss. It would not have allowed its clerk to offer any opinion on the likely outcome on the morning of trial, especially with such a motion pending, and the law clerk has assured the court he said no such thing. At most, the clerk would have conveyed to Ms. Edwards what the court told its clerk to convey, which was to tell Ms. Edwards to appear on Monday to explain the circumstances and be available to Plaintiff as a witness should he seek a continuance.

Second, the court learned of Ms. Edwards' suspension at about the same time as Defendants, by reading the slip opinion from the Court of Appeals. Ms. Edwards did not contact the court in March or early April to request a continuance or to suggest any other problem adhering to the April 25th trial date, even though all parties knew that the suspension was then scheduled to take effect on April 18, 2005. During this time, Defendants' counsel represented to the court's staff members that he had made numerous attempts to contact Ms. Edwards, to no avail, to determine

whether Plaintiff would be ready to proceed to trial on April 25, 2005. When Ms. Edwards finally contacted the court in response to an inquiry about the status of the April 25th trial date, Ms. Edwards emphatically stated that Plaintiff was not seeking a continuance, he would appear ready for trial on April 25th, and would be represented either by Ms. Edwards (with dispensation from the Court of Appeals) or by substitute counsel who was prepared to take the matter to trial. Based on those representations, the court advised counsel for Defendants to prepare for trial and directed both sides to file their trial briefs, the deadline for which had previously been extended. If Ms. Edwards had requested a continuance in early April, the court might have been willing to grant a brief continuance of the trial date, even over the objection of the Defendants. Instead, it was not until April 22, 2005, the Friday before trial, that Ms. Edwards first advised the court that Plaintiff would not be represented for trial on Monday.[2]

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[2]Plaintiff argues that it is not his fault, and not Ms. Edwards' fault, that the substitute counsel Ms. Edwards had lined up backed out at the last minute, and the substitute for the substitute had a scheduling conflict. Without getting into the middle of Ms. Edwards' negotiations with substitute counsel, the court can appreciate the reluctance of new counsel to make a commitment while at the same time Ms.

When Monday came, Plaintiff appeared with Ms. Edwards and without counsel and requested a continuance. Defendants objected and pressed for a ruling on their previously filed motion to dismiss. After hearing at length from all parties, the court denied the request for a continuance. It was not a step the court took lightly. The court fully understood that if the matter proceeded to trial and resulted in a verdict for the Defendants, a reviewing court would have to decide whether the court had properly exercised its discretion.[3]

Edwards was attempting to secure a reprieve from the Court of Appeals. In any event, whether or not it was Plaintiff's fault or Ms. Edwards' fault for Plaintiff's appearance without counsel, it was certainly not Defendants' fault.

[3]In exercising its discretion, the court considered the complexity of the case. Plaintiff characterizes the case as complex, but it had actually devolved into a relatively straightforward matter. While Plaintiff undoubtedly preferred to be represented by counsel, as a result of earlier rulings sanctioning Plaintiff for his earlier procedural defaults or those of his counsel, Plaintiff's witnesses were limited to himself and opposing parties, the case was to be tried without a jury, and the entire case turned on a single disputed factual issue: was the property in question Plaintiff's personal residence for purposes of his statutory right of redemption after he defaulted on his mortgage. Before ordering Plaintiff to proceed on the morning of trial, the court made a judgment that Plaintiff was fully capable of presenting his case in its

The court did not dismiss Plaintiff's case as a sanction, and the decisions addressing that issue are inapposite. Instead, the court denied Plaintiff's last minute motion for a continuance and directed him to proceed without counsel. Plaintiff had a choice, which the court carefully explained to him. He could proceed over his objection, and preserve the issue for appeal. If he prevailed at trial the issue would be moot. If he lost, he could argue on appeal that the court should not have required him to proceed without counsel. Or he could do what he did, which was to elect not to proceed. When Plaintiff announced that he was not prepared to proceed to trial, the court granted Defendants' motion to dismiss for failure to prosecute pursuant to Super. Ct. Civ. R. 41(b).

The Court of Appeals will now have to review the record without knowing what the outcome at trial would have been. Nonetheless, the record is clear. Plaintiff had an opportunity to seek a continuance of the trial based on his lawyer's unfortunate predicament, but chose not to. Plaintiff's counsel could have withdrawn and assisted Plaintiff in fully engaging new counsel in time to try this relatively uncomplicated case, but chose not to. On this record, the court fails to see any

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pared-down procedural posture.

grounds on which to reconsider and reverse the rulings made on April 25, 2005, after careful consideration.

The matter is also before the court on Defendant Seldman's motion for an order releasing the *lis pendens* and his motion for attorneys' fees and costs. The court's dismissal for want of prosecution on April 25, 2005, was an adjudication on the merits. The judgment of dismissal was not docketed until April 27, 2005, and therefore Defendant Seldman's motion for attorneys' fees was timely filed on May 11, 2005, pursuant to Super. Ct. Civ. R. 54(d)(2)(B). Defendant is the prevailing party and, as such, is entitled to costs under Rule 54 and to attorneys' fees pursuant to the Deed of Trust that was foreclosed. The court is not unmindful of the prejudice to Defendant Seldman created by the *lis pendens* and of the financial burden of having to advance his attorneys' fees to defend against Plaintiff's action to set aside the foreclosure. However, it is apparent the Plaintiff intends to appeal this court's judgment of dismissal. Until he does, and the Court of Appeals decides the issue, it cannot be determined with finality that Defendant is the prevailing party. If the court should cancel the lis pendens prematurely, it would permit Defendant Seldman to dispose of the property and frustrate Plaintiff's ability to obtain full relief should he ultimately

prevail. The court is confident that it exercised its discretion in this matter fairly and properly, but Plaintiff has a right to have that question reviewed on appeal. Until then, the court will defer ruling on Defendant Seldman's motion to cancel the *lis pendens* and his motion for costs and attorneys fees. See Breiner v. Daka, Inc., 806 A.2d 180, 183 (D.C. 2002).

Accordingly, it is this 25th day of July, 2005,

ORDERED that Plaintiff's motion for reconsideration be, and it hereby is, denied, and it is

further,

ORDERED that the court will defer ruling on Defendant Seldman's motion for attorneys' fees and costs and his motion for cancellation and release of notice of *lis pendens* until the time for noting an appeal from this order has expired or until the disposition of any appeal that may be taken.

/s/
JUDGE FREDERICK H. WEISBERG

Copies to:

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